(23)

No. 98-404
(13) No. 98-564

FILED
NOV 17 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

October Term, 1998

UNITED STATES DEPARTMENT OF COMMERCE, ET AL.,

Appellants,

v.

UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,

WILLIAM J. CLINTON, ET AL.,

Appellants,

v.

MATTHEW J. GLAVIN, ET AL.

On Direct Appeal From The United States District Courts For The District Of Columbia And The Eastern District Of Virginia

REPLY BRIEF OF CALIFORNIA LEGISLATURE, ET AL.

JOSEPH REMCHO, *Counsel of Record*
KATHLEEN J. PURCELL
JAMES C. HARRISON
REMCHO, JOHANSEN & PURCELL
220 Montgomery Street, Suite 800
San Francisco, CA 94104
Telephone: (415) 398-6230
Facsimile: (415) 398-7256

Attorneys for Intervenor-Defendants Legislature of the State of California, et al.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

21 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. Plaintiffs' Arguments Against Statistical Sampling Are Based on False Assumptions	1
II. Plaintiffs' Statutory Arguments Are Ill-Founded	5
III. Plaintiffs' Constitutional Arguments Misrepresent the History and Meaning of Article I, Section 2	13
CONCLUSION	17

TABLE OF AUTHORITIES

Page(s)

CASES:

American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490 (1981) 7

Anderson v. Edwards, 514 U.S. 143 (1995) 7

Carey v. Klutznick, 508 F. Supp. 404 (S.D.N.Y. 1980) 4

Chevron v. Natural Resources Defense Council, 467 U.S. 837 (1984) 5, 6, 10

Chisom v. Roemer, 501 U.S. 380 (1991) 7

D. Ginsberg & Sons, Inc. v. Popkin, 285 U.S. 204 (1932) 10

Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 6

Good Samaritan Hospital v. Shalala, 508 U.S. 402 (1993) 11

Gregory v. Ashcroft, 501 U.S. 452 (1991) 6

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986) 10

Miller v. Johnson, 515 U.S. 900 (1995) 5, 6

National Wildlife Fed'n v. Browner, 127 F.3d 1126 (D.C. Cir. 1997) 5

Rust v. Sullivan, 500 U.S. 173 (1991) 12

Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479 (1985) 7

United States v. Giordano, 416 U.S. 505 (1974) 10

Wisconsin v. City of New York, 517 U.S. 1 (1996) 3, 11, 12, 13

TABLE OF AUTHORITIES – Continued

Page

Young v. Community Nutrition Inst., 476 U.S. 974 (1986) 7

Young v. Klutznick, 497 F. Supp. 1318 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, *Young v. Baldrige*, 455 U.S. 989 (1982) 4

CONSTITUTIONS:

United States Constitution
Article I, § 2 ..... 12, 13, 14, 15

STATUTES:

13 U.S.C. § 141(a) 7, 9, 10

13 U.S.C. § 141(e)(2) 8

13 U.S.C. § 195 ..... 7, 8, 9, 10

47 U.S.C. § 151, 152(b), 220 10

Pub. L. No. 102-135, §§ 2(a)(1) & 2(b)(1)(C), 105 Stat. 635 (1991) 9

LEGISLATIVE AUTHORITIES:

Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service, 85th Cong., 1st Sess. (1957) 8

H. Rep. No. 94-944, 94th Cong., 2nd Sess. (1976) 8

S. Rep. No. 94-1256, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463 10

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Harvey Choldin, *Looking for the Last Percent: The Controversy Over Census Undercounts* (1994).....5, 16

Comptroller General of the United States, *Programs to Reduce the Decennial Census Undercount, Department of Commerce: Report to the House Committee on Post Office and Civil Service*, GAO Rep. No. GGD-76-72 (May 5, 1976) 9

General Accounting Office Report, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* (July 1997)..... 13

National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington D.C. (1995).....2, 11

The Records of the Federal Convention of 1787, vol. 1 (Max Farrand, ed., rev. ed. 1937)..... 15

U.S. Department of Commerce, Bureau of the Census, *Census 2000 Operational Plan* (April 1998).....3, 11

U.S. Department of Commerce, Bureau of the Census, *Report to Congress – The Plan for Census 2000* (August 1997)..... *passim*

ARGUMENT

I. Plaintiffs' Arguments Against Statistical Sampling Are Based on False Assumptions

The arguments against the use of statistical sampling to provide a more accurate census in the year 2000 are riddled with false assumptions and red herrings:

1. Plaintiffs rely heavily on characterizing the traditional census methods as an actual count of the population and characterizing the use of statistical sampling as an estimate of the population. Brief for the United States House of Representatives ("House Br.") at 11, 33, 45, 47; Brief of Appellees, Matthew J. Glavin, et al. ("Glavin Br.") at 1-2, 42-43, 49, 50. Traditional methods, however, themselves produce only an estimate of the population, and a grievously flawed estimate at that. Statistical sampling is at least as much a method of actual counting as the self-enumeration by mail that has been accepted practice since the 1970s, the centuries old practice of relying upon a neighbor's sense of how many people live next door or down the street, or the decades old practice of imputing the number of residents who cannot be located based upon the characteristics of a nearby residence.

2. Plaintiffs invoke "the way the census has been conducted for 200 years" (House Br. at 24; *see also* Glavin Br. at 36) and a supposed "rule against statistical sampling that has governed the census process throughout our nation's history." House Br. at 8-9; *see also id.* at 31-32, 34-35. There is, however, no "way the census has been conducted" over the past 200 years. To the contrary, census procedures have changed dramatically over the years to accommodate changing conditions and take

advantage of improved techniques and technologies. *See* U.S. Department of Commerce, Bureau of the Census, *Report to Congress – The Plan for Census 2000* (August 1997) (*"Census 2000 Report"*), Joint App. 46-47; National Research Council, *Modernizing the U.S. Census*, National Academy Press, Washington D.C. (1995) at 19-21, 228-38; Declaration of Margo J. Anderson, Joint App. 343-46, 351-52. Statistical sampling did not even exist until the 20th century. Anderson Declaration, Joint App. 343, 347; Declaration of Stephen Elliott Fienberg, Joint App. 377-78. Nothing in the Constitution addresses statistical sampling, and Congress did not address the issue of sampling until 1957. Statistical sampling as contemplated for the 2000 census is a new and refined method of counting the population even as compared to the procedures proposed for the 1990 census. *See Census 2000 Report*, Joint App. 93 ("The methodology has undergone substantial review and improvement by the Census Bureau, the National Academy of Sciences, and by experts in statistical methodology from across the country."). This case is not about estimating population based upon records of white male inhabitants set out in militia returns or polling lists, such as was done in some regions before the founding of the Republic. House Br. at 47 n.65. It is not about the "conjectural" and prospective population figures used for the first apportionment. Glavin Br. at 47-48. Equating statistical sampling with such techniques is a distortion of history and mathematics. *See* Brief on the Merits of the California Legislature, et al., in Case No. 98-404 ("California Brief") at 37-39.

3. Plaintiffs raise the specter of the Census Bureau adding "imagined people" and subtracting other presumably real "people" from the population count based upon statistical sampling. House Br. at 4; *see also* Glavin Br. at 49. People accounted for by statistical sampling are not imaginary simply because they did not receive a census form, did not return one, or were not physically located by a census field worker. To the contrary, it is the uncorrected traditional methods – methods that mistakenly count deceased people, double count people who fill out a census form at both their primary residence and their vacation home or who move during the critical census period, and count people who have never existed – that result in the inclusion of non-existent people. *See* Fienberg Declaration, Joint App. 357-58; *see also Wisconsin v. City of New York*, 517 U.S. 1, 6 (1996).

4. In a similar vein, the House implies that a physical count will be eschewed in favor of a sample census and that a sample of 750,000 households that does not reflect demographic variations in different areas will be projected over the entire nation and across state lines. House Br. at 4. This is not the case. The census planned for the year 2000 includes efforts at a full physical count that make the most of traditional methods. *See Census 2000 Report*, Joint App. at 58-67, 73-80.[1] It includes an effort to reach every household in the nation by mail and

---

[1] The procedures planned for Census 2000 are explained in the Fienberg Declaration, Joint App. 361-68. They are also set forth in further detail in the U.S. Department of Commerce, Bureau of the Census, report entitled, *Census 2000 Operational Plan* (April 1998), Joint App. 148-340.

to count all inhabitants by the mailout/mailback technique. *Id.* at 61. It also includes extensive door-to-door follow-up and outreach campaigns. *Id.* at 58-61, 69-71, 77-79. The statistical adjustments at issue here are designed to supplement the physical count in order to account for those who are not found through this effort and to correct for the double counting that is known to occur. *Census 2000 Report*, Joint App. 41-45, 87-98. The samples for the statistical adjustment will be taken "from all areas of the country, with all race and ethnic groups, from all sizes of towns and cities, and from rural areas," in order to assure an improved distributive count among the states. *Census 2000 Report*, Joint App. 93.[2] "Because this sample is very large, and drawn separately for each state, it will provide reliable population numbers for every state and Congressional district." *Id.*

This is by no means a sample census, and the Court need not reach the question of whether a census based on sampling in lieu of a physical count would be a reasonable exercise of the Secretary's discretion. Rather, the question here is whether statistical sampling may be used to supplement a physical count and correct errors that traditional methods are known to produce.[3] As Professor

[2] *See also id.* at 87 (samples for the Postal Vacancy check), 88 (samples for non-response follow-up).

[3] The limited nature of the statistical adjustment at issue here permits the Court, were it so inclined, to go no further than to hold that the Census Act and Constitution allow the use of statistical sampling as a supplement to more traditional measuring tools rather than in lieu of the traditional methods. *See Carey v. Klutznick*, 508 F. Supp. 404, 415 (S.D.N.Y. 1980); *Young v. Klutznick*, 497 F. Supp. 1318, 1335 (E.D. Mich. 1980), *rev'd on other grounds*, 652 F.2d 617 (6th Cir. 1981), *cert. denied*, *Young v. Baldrige*, 455 U.S. 989 (1982).

Choldin has noted, the agency decision to do the type of statistical corrections at issue here is "a decision that would have been considered technical in a quieter time." Harvey Choldin, *Looking for the Last Percent: The Controversy Over Census Undercounts* (1994) at 5.

II. Plaintiffs' Statutory Arguments Are Ill-Founded

Plaintiffs advance a rule of statutory interpretation that offers no deference whatever to agency construction of the statute that it is entrusted to administer. The House disposes of this Court's extensive precedent calling for such deference in a cursory footnote. House Br. at 26-27 n.36. The Glavin plaintiffs ignore the *Chevron* doctrine altogether.

As we argue in our Brief on the Merits, the deference commanded by this Court in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), and its progeny, applies in full force here and calls for ratification of the Census Bureau and Department of Commerce interpretation of the statute to permit statistical correction of the census. California Brief at 12-30. The cases upon which the House relies are not to the contrary. *See* House Br. at 26-27 n.36. Thus, *National Wildlife Fed'n v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997), supports the proposition that any agency interpretation, even in the midst of litigation, that reflects fair and considered judgment concerning the meaning of the statute, is entitled to deference. 127 F.3d at 1129. *Miller v. Johnson*, 515 U.S. 900 (1995), simply

stands for the proposition that the Court "retains an independent obligation in adjudicating consequent equal protection challenges" in light of an agency interpretation. 515 U.S. at 922. Similarly, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568 (1988), holds that when the agency did not take into account constitutional considerations in interpreting an ambiguous statute, the Court will. 458 U.S. at 577. Neither of these factors pertains here or weighs against the deference to which the interpretation of the Commerce Department is due.[4]

The House further suggests that congressional alteration of a statutory prohibition requires more than an express statutory authorization and more than amendment of the language of the provision in question. House Br. at 10, 29-33, 40. Instead, the House argues, the words in the prohibitory clause must themselves be altered, and the congressional record must explicitly include statements of intent and guidelines for the exercise of the authority granted. *Id.* at 10, 33, 37-38. No legal precedent demands such additional indicia of congressional intent, particularly when, as here, the added language explicitly authorizing use of sampling in the decennial census was totally unnecessary if plaintiffs' interpretation prevails.[5]

---

[4] *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which the House also cites (House Br. at 27 n.36) involved the state's authority vis-a-vis the federal government to set age limits for state court judges; it has nothing to do with agency interpretation of a statute or the question of *Chevron* deference at issue here.

[5] Plaintiffs argue that if Congress intended to repeal a pre-existing prohibition on sampling, the legislative history of the 1976 amendments would have reflected a clear and manifest intention to do so. House Br. at 38-39; Glavin Br. at 30. Significantly, none of the cases plaintiffs cite involved a situation where Congress simultaneously expressed its intent on the face of the statute, as Congress did here in section 141(a), and amended the very statutory provision in which the prohibition was contained in a manner that eliminated any inconsistency, as Congress did here in section 195. There is no requirement that, in addition to expressing its intent in the text of a statute, Congress must reiterate that intent in legislative history. Indeed, "congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 n.13 (1985). Thus, in *Chisom v. Roemer*, 501 U.S. 380, 396 (1991), which the House cites, this Court noted that if Congress had intended to change the law, "Congress would have made it explicit in the statute. . . ." That is precisely what Congress did here.

This argument by the House, and the Glavin plaintiffs' statutory argument, which amounts to a rewrite of the statute and deletion of section 141(a) (*see* Glavin Br. at 28-29, 33, 39-40), are fully answered in our Brief on the Merits.[6] *See* California Brief at 21-22.

---

[6] The Glavin plaintiffs' further argument that section 195 "can only be understood as vesting the Secretary with discretion to sample" (Glavin Br. at 37) would render meaningless the 1976 change in section 195 from "the Secretary may, where he deems it appropriate . . . " to "the Secretary shall, if he considers it feasible . . . ," and it would make section 141(a) surplusage. None of the cases that the Glavin plaintiffs cite in support of this contention involves a statutory scheme comparable to the one here. *See, e.g., Anderson v. Edwards*, 514 U.S. 143, 154 (1995); *American Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 510-11 (1981). *Young v. Community Nutrition Inst.*, 476 U.S. 974 (1986), not only fails to support plaintiffs, it applied the *Chevron* doctrine to hold that the Court must defer to the agency's construction of the scope of its authority. 476 U.S. at 980-81. That is exactly what should happen here, as well.

Despite plaintiffs' repeated claim that amendment of the Census Act in 1976 to authorize the use of sampling for apportionment purposes would constitute a "momentous change" that surely would have been accompanied by heated debate (*See* House Br. at 37, 32-33, 43; Glavin Br. at 31), all indications are that this matter was neither momentous nor controversial.[7] Multiple Census Bureau reports from 1970 through 1976 expressly and without apology noted the importance of sampling to add 1.5 million people in the 1970 count and provide a more accurate census. At the same time that Congress was considering the 1976 amendments to the Census Act, the GAO submitted a report to the House Committee on Post Office and Civil Service, the same committee that reported on the 1976 amendments. Comptroller General

[7] The fact that issues of statistical sampling have all our attention now does not mean they were momentous then. Thus, the House's assertion that the 1957 enactment of section 195 was accompanied by "protracted legislative debate" (House Br. at 37 n.50) is simply wrong. In the 1957 enactments, as in the 1976 amendments, section 195 received little comment and was not highlighted in the statement of legislative purposes. *See Amendment of Title 13, United States Code, Relating to Census: Hearing on H.R. 7911 Before the Subcomm. on Census and Statistics of the House Comm. on Post Office and Civil Service*, 85th Cong., 1st Sess. 4, 7, 8-9 (1957). The assertion that in 1976 Congress was "captivated" by the possible effects of sampling on reapportionment and districting (House Br. at 43) is a distortion of the record. The Census Act's prohibition against use of a mid-decade census for reapportionment (13 U.S.C. § 141(e)(2)) does not signal congressional disapproval of sampling; to the contrary, it reflects Congress' desire to "avoid[ ] the confusion to the public of constantly changing representative districts." H. Rep. No. 94-944, 94th Cong., 2nd. Sess. 18 (1976) (supplemental views on H.R. 11337).

of the United States, *Programs to Reduce the Decennial Census Undercount, Department of Commerce: Report to the House Committee on Post Office and Civil Service*, GAO Rep. No. GGD-76-72 (May 5, 1976). That 1976 GAO report again delineated the use of sampling in the 1970 census. *Id.* at 21-22. Neither the reporting agencies nor any member of Congress at the time expressed any criticism of the 1970 census sampling procedures.[8] Instead, Congress accepted the 1970 Census, used it for reapportionment, and enacted the 1976 amendments to the Census Act which, while devoted in large part to the mid-decade census, also added explicit language to section 141(a) authorizing the use of sampling in the decennial census and modified section 195 in a manner consistent with that change.[9]

[8] Plaintiffs fail to acknowledge or respond to this sequence of events and the complete absence of contemporaneous disapproval. Compare California Brief at 16-19 with House Br. at 43 and Glavin Br. at 30-31. Instead they recite statements made in the 1980s in the midst of litigation over whether the 1980 census would be statistically adjusted (Glavin Br. at 31 n.32), and rely on selective excerpts from legal memoranda analyzing the statute and ultimately concluding that it does not bar statistical sampling to correct the census. House Br. at 31 n.42 and 37-38 n.51. Plaintiffs also noticeably fail to address the fact that a unanimous Congress apparently saw no legal bar to sampling in 1991, when it directed a study by the National Academy of Sciences on the "means by which the Government could achieve the most accurate population count possible," including "the appropriateness of using sampling methods." Decennial Census Improvement Act of 1991, Pub. L. No. 102-135, §§ 2(a)(1) and 2(b)(1)(C), 105 Stat. 635 (1991).

[9] Plaintiffs cite cases for the proposition that "[s]eemingly broad general grants of authority are commonly subject to specific limitations found elsewhere in a statute" as a reason to

That the legislative history attached to the 1976 amendments did not focus on this aspect of the change in law is neither surprising nor determinative. Depending upon what was in the minds of the members of Congress, statements in the legislative history that the new language was added to section 141(a) "to encourage the use of sampling and surveys in the taking of the decennial census,"[10] can support either side in this litigation. Thus, here, as in other situations in which the courts have invoked *Chevron* deference, the legislative history is of little help in casting light on the meaning of the statutory

---

disregard the plain language of section 141(a). House Br. at 29; *see also* Glavin Br. at 28 and n.28. In the cases on which plaintiffs rely, the broad grant of authority did not expressly address the specific agency activity in question, and the specific limitation propounded was not ambiguous. *See United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932). *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986), which the Glavin plaintiffs cite, involved three provisions of the Federal Communications Act: a grant of FCC authority to regulate "interstate and foreign . . . communication," an express denial of "jurisdiction with respect to . . . intrastate communication service," and an ambiguous provision that addressed depreciation. 476 U.S. at 360, 362 (47 U.S.C. §§ 151, 152(b), 220). In holding that the Act did not preempt states' regulation of depreciation rates, this Court found that the section expressly addressing depreciation was not "so unambiguous or straightforward as to override the command of § 152(b)." 476 U.S. at 377. Applying that rationale to the instant situation supports a holding that section 195 of the Census Act is not "so unambiguous or straightforward as to override" the express authorization of section 141(a).

[10] S. Rep. No. 94-1256, 94th Cong., 2nd Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466.

language. *See, e.g., Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 412 n.10 (1993).

Nor is the absence of statutory guidelines for the agency's determination whether to use sampling in any given census something that should give the Court pause. *Cf.* House Br. at 33; Glavin Br. at 34. The census is by its very nature an enormous, complex, and technical endeavor that demands frequent judgment calls and policy determinations by the Census Bureau and the Secretary of Commerce. *See Modernizing the U.S. Census, supra,* at 19; *see generally Census 2000 Report,* Joint App. 34-147, and *Census 2000 Operational Plan,* Joint App. 148-340; *see also Wisconsin v. City of New York*, 517 U.S. at 23 ("Our deference [to the Secretary's determination] arises not from the highly technical nature of his decision, but rather from the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary."). Congress has rarely interposed itself into the methods by which the census will be accomplished and has been content to rely upon the Census Bureau, the Secretary of Commerce, the array of experts including the National Academy of Sciences on whom the Census Bureau relies, and regular reports to the congressional oversight committee. The statutory latitude afforded the decision whether to use statistical sampling to improve the census is no different from the discretion that the agency has long been given over other and equally significant aspects of the census.

The theoretical possibility that the agency will exercise its discretion unreasonably or in a manner that is inconsistent with the Constitution is no reason to deny it the discretion in the first place. Thus, any suggestion that

the Census Act must be interpreted to deny the agency discretion because it might use sampling in a manner that undercuts accuracy and the constitutional goal of equal apportionment set out in Article I, section 2 of the Constitution is without merit. As we discuss in our Brief on the Merits at 30-40, the Constitution does not forbid the use of statistical sampling as a method of counting, and, hence, the Court does not face a situation in which any statutory authorization of sampling would be unconstitutional. *Cf. Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (mere fact that a colorable constitutional argument against the interpretation of a statute may be advanced does not command an alternative interpretation.) Indeed, to the extent that constitutional concerns bear on the issue of statutory interpretation, they support an interpretation that permits statistical correction when, as here, such correction is highly reliable and is necessary to achieve a census that will permit equal apportionment.

In *Wisconsin v. City of New York*, this Court carefully examined whether the agency's decision not to use sampling in the 1990 census was a reasonable one, and upheld it on the grounds that the factors present at that time justified the agency's decision. Specifically, the Court, and the Secretary of Commerce before it, was concerned that use of statistical sampling would sacrifice distributive accuracy for the sake of overall accuracy. *Wisconsin v. City of New York*, 517 U.S. at 18, 20, 22. That is no longer the case. Fienberg Declaration, Joint App. 371-73; *Census 2000 Report*, Joint App. 87-98. For the 2000 census, we know that traditional methods standing alone will result in an increasingly debased census count and that the statistical sampling techniques now available will

improve the accuracy of the census at every level. "At all geographic levels important to political representation and funds allocation, Census 2000 will provide more accurate results than physical enumeration alone." *Census 2000 Report*, Joint App. 44.[11] In these circumstances, a decision not to make the statistical adjustment is arguably both unreasonable and inconsistent with the Constitution. *See Wisconsin v. City of New York*, 517 U.S. at 15, quoting *Franklin v. Massachusetts*, 505 U.S. 788, 806 (1992) (Plaintiffs challenging census decision have the "burden of proving that a decision contrary to that made by the Secretary would 'make representation . . . more equal.' ").

III. Plaintiffs' Constitutional Arguments Misrepresent the History and Meaning of Article I, Section 2

The House incorporates into the constitutional phrase "actual enumeration" a requirement that the

---

[11] The Glavin plaintiffs attempt to create the false impression that the use of sampling will result in a less accurate census. Glavin Br. at 1, 3, 7, 41-42. All that the 1997 GAO report on which plaintiffs rely suggests is that attempts at in the field follow-up with 100% of the households that do not respond to mail questionnaires plus adjustment by statistical sampling would likely be more accurate than in the field follow-up with 90% of the non-responding households plus non-response sampling and adjustment by statistical sampling. General Accounting Office Report, GAO/GGD-97-142, *Progress Made on Design, but Risks Remain* (July 1997) at 26. By contrast, the failure to use statistical sampling which plaintiffs advocate will surely result in a less accurate census no matter how much effort is devoted to in the field follow-up. *Census 2000 Report*, Joint App. 54 (quoting National Academy of Sciences' Panel on Requirements); *see also id.* at 42, 49-52, 99, 106-07.

government count "one by one" only by discounting extant dictionary definitions from the 18th century that support the defendants' and intervenors' contention that an enumeration is a count or an accounting; instead, the House emphasizes alternative, noncontrolling definitions that include the concept of counting "singly" or "each separately." *Compare* House Br. at 1, 45-46 with House Br. at 46 nn.63 and 64; *see also* California Brief at 32-33. The Glavin plaintiffs achieve the same result by simply omitting contemporaneous definitions that are inconsistent with their argument. *Compare* Glavin Br. at 44-45 with California Br. at 32-33. Established census procedures such as census by mail, self-enumeration, imputation, and hearsay information would all be inconsistent with the interpretation of the constitutional language that plaintiffs propose. As we discuss in our Brief on the Merits, the constitutional language is entirely consistent with the statistical corrections contemplated here, and the constitutional purpose of equal apportionment demands such correction. California Br. at 30-40.

The history of article I, section 2 is likewise consistent with discretionary use of statistical sampling to correct the census count. The House suggests that the Founding Fathers intended to prohibit the use of statistical sampling in order to avoid political manipulation of the census. House Br. at 11, 48. This theory reads into the Constitutional Convention of 1787 matters that were never there. The political manipulation that the framers feared was twofold. First was the concern that unless Congress was constitutionally required to reapportion it would refuse to do so and lock in the relative political power of the northern and eastern states. *See, e.g., The*

Records of the Federal Convention of 1787, vol. 1 (Max Farrand, ed., rev. ed. 1937) at 533-34, 540-41, 558-61, 578-80, 583-86. Second was the concern that if timing and a population formula were not constitutionally fixed, then future congresses would revisit and alter the compromise whereby slaves would be counted only as 3/5 of a person. *Id.* at 592-96. The fixed and objective constitutional standard that the framers adopted to resolve these concerns was that the census be based upon population, include the whole number of some persons and exclude or only partially count others, and occur every 10 years. U.S. Const., art. I, § 2, cl. 3. The framers expressly left the method of counting to the discretion of the Congress. *Id.*[12]

Plaintiffs' asserted fear of political manipulation ignores the incontrovertible fact that the method of statistical sampling contemplated for the 2000 census would be established *before* the count was taken and so would not create any substantial opportunity for political manipulation. *Census 2000 Report*, Joint App. 132. Moreover, whether or not the statistical adjustment procedures are set in advance, they present no more opportunity for manipulation, and in many respects less opportunity, than other more conventional aspects of the census. *See*

---

[12] Put another way, article I, section 2 commands that Congress determine every 10 years how many individuals reside in the nation and in each of the several states. A physical enumeration is designed to answer this question but does so with considerable error. The combined physical enumeration and statistical adjustment at issue here answers the very same question and does so with greater accuracy.

Choldin, *supra*, at 162, 236; *Census 2000 Report*, Joint App. 42-44.[13]

Amici Washington Legal Foundation expresses concern that persons interested in maximizing the political power of their neighborhood or state will manipulate the mail back procedures and lie to field workers. Brief of Washington Legal Foundation, et al. at 27-28. That risk, which is inherent in the traditional census methods as well, would actually be mitigated by the ability to send a limited number of highly qualified, well trained field workers into the sample area. *See Census 2000 Report*, Joint App. 89. Indeed, the dearth of qualified field workers is one reason why a 2000 census based exclusively on traditional methods, without the benefit of statistical sampling, will result in unreliable and incomplete information. *Census 2000 Report*, Joint App. 99-100.

[13] For example, the funds budgeted for the census are a critical determinant in how much follow-up to the mail campaign can be achieved and what sort of outreach efforts are possible, with significant consequences for how many and what type of people will be counted or excluded. Similarly, the Census Bureau's plans in each stage – from compiling address lists, to hiring field workers, to partnerships with local governmental and non-governmental organizations – all are subject to partisan manipulation. Leaving such matters, including the question of whether to do statistical correction, to the agency serves to protect against rather than encourage political manipulation.

CONCLUSION

For their own reasons, plaintiffs are satisfied with and seek a 2000 census that will seriously undercount African Americans, Hispanics, Asian Americans and Pacific Islanders, renters and children. The Legislature of the State of California, which faces using the census figures for redistricting and having them used for the distribution of federal funds, is not satisfied with such a census. The California Legislature supports the Census Bureau's carefully developed plan to use statistical sampling to correct the census undercount. Neither the Constitution nor the Census Act erects a barrier to that effort.

The judgments below should, therefore, be reversed.

Dated: November 16, 1998

Respectfully submitted,

JOSEPH REMCHO, *Counsel of Record*
KATHLEEN J. PURCELL
JAMES C. HARRISON
REMCHO, JOHANSEN & PURCELL

Attorneys for Intervenor-Defendants Legislature of the State of California, et al.